## INDEX


| | Page |
|---|---|
| Docket Entries | 2 |
| Complaint for Injunctive and Declaratory Relief (CBA) | 8 |
| Notice of Related Cases (CBA) | 15 |
| Motion for Temporary Restraining Order (CBA) | 17 |
| Affidavit of Robert H. Fabian (CBA) | 18 |
| Affidavit of William Ehler (Stark) | 24 |
| Application for Temporary Restraining Order (Stark) | 26 |
| Affidavit of Thomas A. Stark | 28 |
| Affidavit of Charles C. Marson | 31 |
| Affidavit of Jay A. Miller | 33 |
| Opposition to Applications for Temporary Restraining Order (Conjoined) | 35 |
| Memorandum of Decision on Application for Temporary Restraining Order (Conjoined) | 40 |
| Notice re Convening of Three Judge Court (CBA) | 44 |
| Notice of Motion and Motion for Preliminary Injunction (Conjoined) | 46 |
| Affidavit of E. L. Brockett in Support of Motion for Preliminary Injunction | 48 |
| Affidavit of Bren Luthi in Support of Motion for Preliminary Injunction | 49 |

Page

Notice of Motion and Motion for Order Extending Temporary Restraining Order (Conjoined) ..... 50

Supplementary Affidavit of Jay A. Miller in Support of Plaintiff's Motion for Preliminary Injunction (Stark) ..... 52

Affidavit of Alfred P. Davies in Support of Plaintiff's Motion for Preliminary Injunction (Stark) ..... 54

Motion to Dismiss by Defendants (Conjoined) ..... 56

Opposition to Motions for Preliminary Injunctions (Conjoined) ..... 58

First Amended Complaint (Stark) ..... 62

Notice of Motion and Motion for Leave to Amend Complaint by Adding Plaintiffs (Stark) ..... 73

Memorandum of Decision (Conjoined) ..... 75

Order granting in part Preliminary Injunction (Conjoined) ..... 94

Notice of Appeal by Defendants to Supreme Court from Order Granting in Part Preliminary Injunction (CBA) ..... 96

Notice of Appeal by Defendants (Stark) ..... 98

Notice of Cross-Appeal to Supreme Court (CBA) ..... 100

Notice of Cross-Appeal to Supreme Court (Stark) ..... 102

Order Noting Probable Jurisdiction ..... 104

# APPENDIX

## In the
# Supreme Court of the United States

OCTOBER TERM, 1973

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**No. 72-985**

THE CALIFORNIA BANKERS ASSOCIATION,
*Appellant,*

VS.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
*Appellees.*

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**No. 72-1073**

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
*Appellants,*

VS.

THE CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., et al.,
*Appellees.*

---

**No. 72-1196**

FORTNEY H. STARK, JR., et al.,
*Appellants,*

VS.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
*Appellees.*

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**On Appeals from the United States District Court for the Northern District of California**

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**Jurisdiction Statement in No. 72-985 Filed January 12, 1973**
**Jurisdiction Statement in No. 72-1073 Filed February 5, 1973**
**Jurisdiction Statement in No. 72-1196 Filed March 2, 1973**
**Probable Jurisdiction Noted October 9, 1973**

## DOCKET ENTRIES

**The California Bankers Association vs. John B. Connally**

*United States District Court*
*for the Northern District of California*
*No. C 72-1157 WTS*

| DATE 1972 | PROCEEDINGS |
|---|---|
| June 22 | 1. Filed Complaint, issued Summons. |
| | 2. Filed Order for Service Other Than U.S. Marshal (Craig Adryan) (Clerk). |
| | 3. Filed Notice of Related Cases. |
| 29 | 4. Filed Motion for Temporary Restraining Order, with Points and Authorities and Affidavit of Robert H. Fabian. |
| 29 | Case No. 72-1045 was consolidated with this case for the purposes of hearing Temporary Restraining Order. After hearing, ordered further hearing continued to June 30, 1972, at 4:00 p.m. |
| 30 | 5. Filed Notice re: Convening of Three Judge Court (Judge Sweigert) |
| | Further order that a temporary restraining order has been granted, in part; and the hearing on application for preliminary injunction has been set for July 20, 1972, at 10:00 a.m. Further ordered that this action has been consolidated with *Stark v. Connelly*, No. C-72-1045, in which a three-judge court has already been appointed, composed of Judge Oliver D. Hamlin, Judge William D. East & Judge Sweigert. |
| July 7 | 6. Filed Notice of Motion and Motion for Preliminary Injunction; calendared for July 17, 1972 at 10:00 a.m. |
| | 7. Filed Notice of Motion and Motion for Order Extending Temporary Restraining Order; calendared for July 17, 1972, 10:00 a.m. |
| 13 | 8. Filed Motion to Dismiss by the defendants. |
| | 9. Filed Opposition to Motions for Preliminary Injunctions, by the defendants. |
| | 10. Filed Motion to Dismiss by the defendants. |
| | 11. Filed Order Shortening Time for Hearing Defendant's Motion to Dismiss on July 17, 1972, at 10:00 a.m. |
| | 12. Filed Notice of Motion to Dismiss by the Defendant to be heard at 10:00 a.m., July 17, 1972. |

| DATE 1972 | PROCEEDINGS |
|---|---|
| July 17 | Three judge hearing, plaintiff's Motion to Amend Complaint by Adding More Parties granted; plaintiff's Motion for Preliminary Injunction and defendant's Motion to Dismiss submitted; Motion to Extend Temporary Restraining Order Pending Decision granted. (Judges Hamlin, Sweigert & East) |
| Sep 11 | Filed Memorandum of Decision. (Judges Sweigert and East, with Hamlin dissenting and concurring) (No. 72-1045-WTS). |
| 21 | 13. Filed Notice of Lodging of Proposed Order. |
| | Lodged proposed order granting preliminary injunction in part and dismissing complaint in part. |
| Oct. 6 | 14. Filed defendant's Notice of Appeal to the Supreme Court of the United States. |
| 10 | 15. Filed plaintiff's Notice of Cross-Appeal to the Supreme Court of the United States. |
| 11 | Mailed Clerk's Notice to Parties of Record on Appeal to the Supreme Court of the United States. |
| 12 | Mailed Clerk's Notice to Parties of Record on Cross-Appeal to the Supreme Court of the United States. |
| 18 | Filed Order Granting in Part preliminary injunction. (No. 72-1045) |
| 24 | 16. Filed Designation of Record by California Bankers Association. |
| 26 | 17. Filed Designation of Record by United States. |
| Nov. 8 | Made and mailed Record on Appeal to Supreme Court of the United States by certified mail, receipt no. 224337. |
| 13 | 18. Filed Notice of Appeal by defendants to The Supreme Court of the United States. |
| | Mailed Clerk's notice of filing Notice of Appeal to parties of record. |
| | Filed receipt from the Supreme Court of the United States for Record on Appeal (No. 72-1045-WTS) |
| 15 | Made and mailed First Supplemental Record on appeal to Supreme Court of the United States by certified mail, receipt no. 224338. |
| 16 | 19. Filed Notice of Cross-Appeal to the Supreme Court from the Order of October 18, 1972 by plaintiff, The California Bankers Association. |
| Nov. 17 | Made and mailed Clerk's Notice of Filing Notice of Appeal to Parties of Record. |

| DATE 1972 | PROCEEDINGS |
|---|---|
| 20 | Filed receipt from the Supreme Court of the United States for Supplemental Record on Appeal. (No. 72-1045) |
| 29 | Made and mailed Second Supplemental Record on Appeal to Supreme Court of the United States by certified mail, receipt no. 224339. |
| Dec. 5 | Filed receipt from the [United States Supreme Court] for Second Supplemental Record on Appeal. (No. 72-1045). |

**Fortney H. Stark, Jr. et al vs. John B. Connally et al.**

*United States District Court*
*for the Northern District of California*
*No. C 72-1045 WTS*

| DATE 1972 | PROCEEDINGS |
|---|---|
| June 7 | 1. Filed Complaint, issued Summons. (Request for Three Judge Court) |
| | 2. Filed Order for Service Other Than U.S. Marshal. |
| | 3. Filed Notice of Requirement of Three Judge Court. (File to Judge Sweigert). |
| June 9 | 4. Filed Order for Service Other than U.S. Marshal. |
| June 12 | 5. Filed Notice Re: Convening of Three Judge Court, (Judge Sweigert.) |
| June 26 | 6. Filed Order Convening Three Judge Court, consisting of Judges Oliver D. Hamlin, William T. Sweigert and William G. East. (chambers.) |
| | Made and mailed files to Hon. Oliver D. Hamlin, William T. Sweigert, and William T. East. |
| June 29 | 7. Filed Plaintiff's Memorandum of Points and Authorities re: Temporary Restraining Order. Copies mailed to Judge Hamlin and Judge East on June 29, 1972. (Judge Sweigert.) |
| 29 | Case No. C-72-1157 was consolidated with this case for the purpose of hearing temporary restraining order. After hearing, further hearing continued to June 30, 1972 at 4:00 p.m. |
| 29 | On this date certain documents were taken to Judge Sweigert's Chambers without being docketed and Distribution being made. |
| 29 | 7a. Filed Affidavit of William Ehler. |
| | Mailed Affidavit of William Ehler to Judge East and Judge Hamlin, original copy in Chambers of Judge Sweigert. |

| DATE 1972 | PROCEEDINGS |
|---|---|
| June 30 | 8. Filed Amended Verification by Charles C. Marson. Mailed copies to Judge East and Judge Hamlin, June 30, 1972—(Judge Sweigert) |
| | 9. Filed Memorandum of Decision on Application for Temporary Restraining Order. Mailed copies to Judge Hamlin and Judge East. |
| June 29 | 10. Filed Application for Temporary Restraining Order. |
| | 11. Filed Opposition to Application for Temporary Restraining Order. |
| July 7 | 12. Filed Notice of Motion and Motion for Preliminary Injunction, noticed for July 17, 1972, at 10:00 a.m. |
| | 13. Filed Notice of Motion and Motion for Order Extending Time—Temporary Restraining Order, noticed for July 17, 1972 at 10:00 a.m. |
| | 14. Filed Notice of Motion and Motion for Preliminary Injunction, noticed for July 17, 1972, at 10:00 a.m. |
| | 15. Filed plaintiff's Opening Memorandum of Points and Authorities Re: Preliminary Injunction. Copies of [docket entries] of 12, 13, 14 and 15 above were forwarded to Judge Hamlin and Judge East. |
| | 16. Filed Stipulation Extending Time for Plaintiffs to File Evidentiary Papers and Briefs Concerning Plaintiffs' Motion for Preliminary Injunction to and including July 7, 1972. |
| | 17. Filed Notice of Errata in re: Plaintiffs' Memorandum of Points and Authorities, etc. (for specifics, see the file.) |
| | 18. Filed Supplementary Affidavit of Jay A. Miller in Support of Plaintiffs' Motion for Preliminary Injunction. |
| | 19. Filed Affidavit of Alfred R. Davies in Support of Plaintiffs' Motion for Preliminary Injunction. Mailed copies of documents re 16, 17, 18, and 19 above to Judge Hamlin and Judge East on July 11, 1972. |

| DATE 1972 | PROCEEDINGS |
|---|---|
| July 13 | 20. Filed Motion to Dismiss by the defendants. |
| | 21. Filed Memorandum in Support of defendants' Motion to Dismiss and Opposition to Motions for Preliminary Injunction. |
| | 22. Filed Opposition to Motions for Preliminary Injunctions by the defendants. |
| | 23. Filed Notice of Motion to Dismiss Action, scheduled for July 17, 1972 at 10:00 a.m. |
| | 24. Filed Order Shortening Time for Hearing Defendants' Motion to Dismiss, July 17, 1972 at 10:00 a.m. Mailed copies of documents 22, 23, and 24 to Judge East and Judge Hamlin on July 14, 1972 (Judge Sweigert.) |
| July 17 | 25. Filed Plaintiffs' Reply Memorandum Re: Preliminary Injunction. |
| | 26. Filed Rejoinder Memorandum in Support of Preliminary Injunction and in Reply to Motion to Dismiss. |
| | 27. Filed Order Shortening Time for Hearing Motion to Amend Complaint. |
| | 28. Filed Notice of Motion for Leave to Amend Complaint by Adding Plaintiffs. |
| | Three Judge Hearing, Plaintiffs' Motion to Amend Complaint by adding more parties granted, Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss submitted; Motion to Extend (Hamlin, Sweigert and East) Temporary Restraining Order Pending Decision granted. |
| July 20 | 29. Filed Plaintiffs' [Supplementary] Memorandum Re: Preliminary Injunction. |
| Sept. 11 | 30. Filed Memorandum of Decision (Judge Sweigert and Judge East, with Judge Hamlin dissenting and concurring). |
| Sept. 21 | 31. Filed Notice of Lodging of Proposed Order. |
| | Lodged proposed order granting preliminary injunction in part and dismissing complaint in part. |
| Oct. 6 | 32. Filed defendants' Notice of Appeal to the Supreme Court of the United States. |
| Oct. 11 | Mailed Clerk's Notice of Appeal to the Supreme Court of the United States to parties of record. |
| | 33. Filed Plaintiffs' Notice of Cross-Appeal to the Supreme Court of the United States. |

| DATE 1972 | PROCEEDINGS |
|---|---|
| Oct. 12 | Mailed Clerk's Notice to parties of record on Plaintiffs' Notice of Cross Appeal to the Supreme Court of the United States. |
| Oct. 18 | 34. Filed Order Granting in Part Preliminary Injunction (Judge Sweigert) |
| Nov. 8 | Made and mailed record on appeal to Supreme Court of the United States by certified mail receipt no. 224337. |
| Nov. 13 | 35. Filed Notice of Appeal by defendants to Supreme Court of the United States. |
| | Mailed Clerk's Notice of Filing Appeal to parties of record. |
| | 36. Filed receipt from the Supreme Court of the United States for record on appeal. |
| Nov. 15 | Made and mailed First Supplemental Record on Appeal to Supreme Court of the United States by certified mail, receipt no. 224338. |
| Nov. 20 | 37. Filed receipt from the Supreme Court of the United States for first supplemental record on appeal. |
| Nov. 17 | 38. Filed Notice of Cross-Appeal to the Supreme Court of the United States by plaintiffs. |
| Nov. 27 | Mailed Clerk's Notice of Filing Cross-Appeal to parties of record. |
| Nov. 29 | Made and mailed Second Supplemental Record on Appeal to Supreme Court of the United States by certified mail receipt no. 224339. |
| Dec. 5 | 39. Filed receipt from the Supreme Court of the United States for Second Supplemental Record on Appeal. |
| 1973 | |
| Jan. 16 | 40. Filed Letter to Mr. Marson re: application for extension of time for docketing an appeal from Michael Rodak, Jr., Esq., Clerk of the Supreme Court of the United States. |
| Feb. 9 | 41. Filed copy of letter from Michael Rodak, Jr., Clerk of the Supreme Court of the United States to Charles C. Marson stating, "Your application for a further extension of time in which to docket an appeal in the above entitled case has been presented to Mr. Justice Douglas who, on February 5, 1973, signed an order extending your time to and including March 2, 1973." |

Filed Jul 22, 1972

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
3300 Crocker Plaza
San Francisco, California 94104
Telephone: (415) 362-5808

*Attorneys for Plaintiff,*
*The California Bankers Association*

*United States District Court*
*For the Northern District of California*

No. 72-1157 WTS

The California Bankers Association,
*Plaintiff,*

v.

John B. Connally, Jr., Secretary of the Treasury of the United States; George P. Shultz, Secretary-Designate of the Treasury; William B. Camp, Comptroller of the Currency; Myles J. Ambrose, Commissioner of Customs; Johnnie M. Walters, Commissioner of the Internal Revenue Service; Herman Nickerson, Jr., Administrator of the National Credit Union; The Board of Governors of the Federal Reserve System; the Federal Home Loan Bank Board; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission,
*Defendants.*

## COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

### *Jurisdiction and Venue*

1. This is an action for injunctive and declaratory relief to prevent enforcement of an Act of Congress and regulations promulgated pursuant to that Act. This Court has jurisdiction under 5 U.S.C. 500 et. seq.; 5 U.S.C. 701-706; and 28 U.S.C. 1331, 1332, 1346, 1348, 1349, 1361, 2201, and 2282. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. Each of the defendants has performed or threatens to perform the acts alleged in this complaint within the Northern District of California, and the plaintiff's claim arises in this District. Pursuant to 28 U.S.C. 1391, venue is proper in this District.

### *Parties*

3. The plaintiff, California Bankers Association, is an unincorporated association consisting of 158 state and national banks doing business in the State of California. The member banks of the plaintiff are referred to as "the members." Each member maintains many thousands of accounts and is involved in numerous transactions daily which fall within the provisions of the Act of Congress and regulations under attack herein. If such Act and regulations are permitted to become effective, compliance by the members will cost them many thousands of dollars per year and inflict upon them the irreparable injury hereafter described. Alternatively, failure of members to comply with the Act and regulations will subject them to substantial civil and criminal penalties.

4. Defendant John B. Connally, Jr., is the Secretary of the Treasury of the United States, and is referred to

in this complaint as "the Secretary." Defendant Charles Shultz has been nominated Secretary of the Treasury, subject to confirmation by the United States Senate. Defendants Connally and Shultz are charged with the duty and responsibility of enforcing the Act and regulations which are the subject of this complaint.

5. Defendant William B. Camp is Comptroller of the Currency; defendant Myles J. Ambrose is Commissioner of Customs; defendant Johnnie M. Walters is Commissioner of the Internal Revenue Service; defendant Herman Nickerson, Jr., is Administrator of the National Credit Union. Defendants Camp, Ambrose, Walters, Nickerson, and the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission are charged under the Act and regulations with the duty and responsibility of enforcing the Act and regulations in question.

*Claim for Relief*

6. In 1970 the Congress of the United States enacted and the President of the United States signed into law Public Law 91-508, 84 Stat. 114 *et seq.*, 31 U.S.C. § 1051 *et seq.*, referred to in this complaint as "the Act."

7. In April, 1971, purportedly pursuant to the authority granted to him by the Act, the Secretary of the Treasury promulgated certain regulations adding Part 103 to the Code of Federal Regulations, referred to hereinafter as "the regulations." These regulations are, unless otherwise enjoined, to become effective July 1, 1972.

8. The Act and regulations require that the plaintiff's members affirmatively and promptly report to the Secretary, in addition to other transactions, the following:

a) The transportation by plaintiff's members of monetary instruments having a value of more than $5,000.00 into or out of the United States;

b) Each deposit, withdrawal, exchange of currency or other payment by, through, or to one of plaintiff's members which involves a transaction in currency of more than $10,000; except that the members are not required to report transactions with an established customer which it reasonably concludes does not exceed in its currency transactions amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.

9. The Act and regulations further require that the members retain either the original or a microfilm or other copy or reproduction of each of the following:

a) The front and back of all checks and money orders drawn on it; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criteria are exempt;

b) Records of each transaction involving a checking or savings account;

c) Records of each extension of credit of more than $5,000 not secured by real property;

d) Records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

10. The reporting and record keeping requirements under the Act and regulations may be modified or expanded

at the will of the Secretary under C.F.R. 103445(a), which provides, in part, as follows:

> "The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions."

The aforesaid discretionary power to modify or expand the requirements threatens to deprive members of their constitutional right of due process and equal protection under the Fifth Amendment of the United States Constitution and is a void delegation of legislative power and/or an excessive exercise of legislative power previously delegated in contravention of Article I of the United States Constitution. The foregoing regulation likewise purports to authorize the Secretary to modify or expand the regulations without complying with the procedure specified by the Administrative Procedure Act (5 U.S.C. 500 *et. seq.*)

11. Each member maintains a close business relationship with its depositors and customers which is founded upon the member maintaining the confidential nature of its depositors' and customers' business transactions. Compliance with the provisions of the Act and regulations described herein will prevent members from maintaining such confidence thereby destroying the business relationship that exists. The destruction of such business relationship will cause members to sustain irreparable injury by virtue of losing significant numbers of customers and depositors as well as losing the good will and confidence essential to the operation of a bank. Such injury will de-

prive members of their property without due process of law and denies members the equal protection of the laws guaranteed to them under the Fifth Amendment to the United States Constitution.

12. If the Act and regulations are permitted to become effective, members will be forced to act as agents of and co-conspirators with defendants for the purpose of: (a) illegally violating depositors' and customers' right of privacy; (b) abridging depositors' and customers' freedom of speech and assembly as guaranteed by the First Amendment of the United States Constitution; (c) engaging in unreasonable searches and seizures in contravention of the Fourth Amendment to the United States Constitution; and (d) depriving depositors and customers of the due process of laws, equal protection of the laws and abridging their privileges and immunities in violation of the Fifth and Fourteenth Amendments of the United States Constitution. As a direct and proximate result, members will be exposing themselves to potential liability from such depositors and customers thereby depriving members of their property without due process of laws and denying them the equal protection of the laws as guaranteed by the Fifth Amendment of the United States Constitution.

13. A number of customers and depositors of members are religious, political and controversial entities or members of such entities to whom the freedom of speech and association is protected under the First Amendment. Such customers and depositors are often the targets of official surveillance because of the unorthodoxy of their beliefs. Disclosure of the information called for by the Act and regulations is a method of implementing such surveillance. Members are illegally being required by the scheme of governmental surveillance encompassed within the Act and

regulations to be the perpetrators of illegal searches and seizures as well as a co-conspirator with the government in supressing the freedom of speech and assembly and the civil rights of such customers and depositors.

14. The plaintiff's members have no plain, speedy or adequate remedy at law. If this Court does not enjoin defendants as hereinafter prayed, the plaintiff and the members will immediately and irreparably suffer injury as alleged.

15. An actual controversy exists between the plaintiff and the defendants. The plaintiff believes and alleges that the Act and regulations are unconstitutional, null and void in their entirety in that they violate Article I and the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution. At the same time, the plaintiff is informed and believes, and, based upon such information and belief, alleges that defendants contend that the Act and regulations are legal and constitutional in all respects.

WHEREFORE, the plaintiff prays that this court:

1. Issue preliminary and permanent injunctions enjoining and preventing defendants and their agents, servants, employees, representatives and successors from enforcing any of the provisions of the Act and regulations in dispute herein;

2. Issue a declaratory judgment declaring the Act and regulations in dispute herein unconstitutional, null and void in their entirety as being repugnant to Article I and the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

3. Grant plaintiff its costs of suit; and

4. Grant such other and further relief as may be just and proper.

Dated: June 22, 1972.

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
By Philip E. Diamond
*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing]

NOTICE OF RELATED CASES

Notice is hereby given, pursuant to Rule 101 of the Local Rules of Practice of the United States District Court for the Northern District of California, that the above entitled action is related to another case, also filed with this court, to wit: FORTNEY H. STARK, JR., ET AL., v. JOHN B. CONNALLY, JR., ET AL, No C-72-1045 WTS, filed on June 7, 1972.

Both cases involve the same defendants and relate to the unconstitutionality of Public Law 91-508, 84 Stat. 1114 *et. seq.*, and the invalidity of regulations adopted pursuant thereto. Both actions seek to enjoin enforcement of such regulations and pray for a declaration that Public Law

91-508 and the regulations adopted pursuant thereto are unconstitutional and invalid.

Dated: June 22, 1972.

Philip E. Diamond
John M. Anderson
Landels, Ripley & Diamond

By Philip E. Diamond
*Attorneys for Plaintiff*

Original Filed—Jun 29 1972
Clerk, U. S. Dist. Court, San Francisco

*United States District Court*
*For the Northern District of California*

[Title omitted in printing]

No. 72-1157 WTS

## MOTION FOR TEMPORARY RESTRAINING ORDER

Based on the complaint, the accompanying affidavit of Robert H. Fabian and the accompanying memorandum of points and authorities, the plaintiff moves the Court as follows:

To issue a temporary restraining order suspending and restraining the operation, enforcement, or execution of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 1051-1122 (1972) and the regulations promulgated thereunder, 31 C.F.R. § 103.11-49 (1972) pending a hearing upon the issuance of the preliminary injunction sought in this case.

This motion and the complaint are based on the contentions that:

1. 31 U.S.C. § 1051-1122((1972) is unconstitutional.

2. The Secretary of the Treasury, unless enjoined, threatens to enforce the foregoing Act of Congress and the regulations he has promulgated thereunder;

3. Unless the operation and enforcement of the foregoing Act and regulations are restrained pending a hearing upon the issuance of the preliminary injunction sought in this case, injury to plaintiff's members in the interim will be irreparable, even by final judgment in plaintiff's favor; and

4. No injury will be sustained by the government through issuance of a temporary injunction.

Dated: June 28, 1972.

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
*Attorneys for Plaintiff,*
*The California Bankers Association*

By s/JOHN M. ANDERSON
John M. Anderson
3300 Crocker Plaza
San Francisco, California 94104

*United States District Court*
*For the Northern District of California*

[Title omitted in printing]

No. C-72-1157 WTS

AFFIDAVIT OF ROBERT H. FABIAN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

State of California
County of San Francisco—ss:

Robert H. Fabian, being first duly sworn, states:

1. I am Senior Vice President and General Counsel of the Bank of America, N.T. & S.A. and Vice-Chairman of the Government Affairs Division of the California Bankers Association. The Bank of America is a member bank of the California Bankers Association (the "CBA"), a non-profit corporation comprising 158 state and national banks

doing business in the State of California. The member banks of the CBA are referred to in this affidavit as "the members."

*The Act*

2. In May, 1970, the Congress of the United States enacted and the President signed into law the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 1051-1122 (Supp. 1972) referred to in this affidavit as "the Act."

*The Regulation*

3. In March, 1972, the Secretary of the Treasury promulgated certain regulations in alleged accord with the Act. These regulations (referred to in this affidavit as "the regulations") are set forth at 31 C.F.R. § 103.11-103.51 (1972). They are due to become effective July 1, 1972.

*Currency Transactions*

5. The regulations require, *inter alia,* that all banks, including the CBA's members, affirmatively and promptly report to the Secretary of the Treasury each deposit, withdrawal, exchange of currency, or other payment by, through, or to one of the plaintiff's members which involves a transaction in currency of more than $10,000. (The CBA's members are not, however, to report a transaction with an established customer which it reasonably concludes does not exceed its currency transaction amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.) See 31 C.R.F. § 103.22 (1972).

6. Compliance with the foregoing regulation would constitute a complete breach and abandonment of the members' confidential and fiduciary relationships with its de-

positors; and the expenditure of additional sums of money for administration, wages, and record keeping equipment and material.

*Record Keeping*

7. The Act and regulations further require that members retain either the original or microfilm or other copy or reproduction of the front and back of all checks and money orders drawn on the member banks; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criterion. See 31 C.F.R. § 103.33 (1972).

8. Compliance with the foregoing regulation could require members to completely breach their fiduciary and confidential relationship with their depositors; to make involuntary disclosures of the details of their depositors' accounts; and to expend substantial sums of money in payment for copying equipment and materials, storage facilities, wages, and other administrative costs.

9. The regulations further require that the members retain either the original or a microfilm or other copy or reproduction of the records of each transaction involving a checking or savings account; the records of each extension of credit of more than $5,000 not secured by real property; and records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

10. Compliance with the foregoing regulation could wholly disrupt the members' confidential and fiduciary relations with long-standing depositors and entail the ex-

penditure of substantial additional sums of money by each member for recording equipment, storage facilities, wages, and attendant bookkeeping.

*Secretary's Discretion*

11. The reporting and record bookkeeping requirements described above are subject to modification by the Secretary of the Treasury in accord with 31 C.F.R. § 103.45 which provides in part:

> "The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions."

The foregoing regulation threatens to deprive the members of their Constitutional right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

*Bank-Depositor Relationship*

12. Each of the members maintains a close business relationship with its depositors. That relationship is founded upon the members' maintaining the trust and confidence of their depositors. Compliance with the regulations described above will prevent the members from maintaining that confidence and substantially impair their relationship with their depositors. The impairment of that relationship will cause members to sustain irreparable injury in that they will lose significant numbers of customers and deposi-

tors as well as the good will and confidence essential to the operation of a bank.

13. I am informed and believe and on that basis state that if the regulations described above are enforced, the members' depositors will seek and find alternate means to conduct their business transactions, free from the scrutiny and surveillance of the Federal government.

14. If the regulations described above are permitted to become effective, the members will be forced to act as agents of and co-conspirators with defendants for the purpose of illegally violating their depositors' right of privacy; and abridging their depositors' freedom of speech and assembly as guaranteed by the First Amendment of the United States Constitution. The reporting requirement set forth in 31 C.F.R. 103.22 (1972) and implied in 103.31-37 (1972) constitutes an unreasonable search and seizure in contravention of the Fourth Amendment to the United States Constitution, and will deprive depositors of due process of law and equal protection of the law, as well as abridging their privileges and immunities in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

15. As a direct and proximate result of the foregoing, the members will be exposing themselves to potential liability from their depositors.

16. A number of depositors of the members are religious, political and socially controversial entities to which freedom of speech and association are protected under the First Amendment. Such depositors are often the targets of official surveillance because of the unorthodoxy of their beliefs. Disclosure of the information called for by the Act and the regulations is a method of implementing such surveillance. Members are illegally being required by the

scheme of governmental surveillance encompassed within the regulations to be the perpetrators of illegal searches and seizures as well as co-conspirators with the Government in supressing the freedom of speech and assembly and civil rights of their depositors.

17. By reason of the foregoing and on behalf of the California Bankers Association, I respectfully pray an order of this Court temporarily restraining the operation and enforcement of the Act and those regulations promulgated by the Secretary of the Treasury and set forth at 31 C.F.R. § 103.11-51 (1972).

At San Francisco, California, this 29th day of June, 1972.

s/ ROBERT H. FABIAN
Robert H. Fabian

Subscribed and sworn to before
me this 29th day of June, 1972

s/ DIANE C. CERDENA
Notary Public
for the County of
San Francisco

June 29

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
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of Northern California, Inc.
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*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

CIVIL NO. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
*Plaintiffs,*
vs.
John B. Connally, Jr., et al.,
*Defendants.*

City and County of San Francisco } ss
State of California }

## AFFIDAVIT OF WILLIAM EHLER

WILLIAM EHLER, being sworn, deposes and says:

1. I am the Assistant Chief Analyst of, and an officer of, the Bank of America National Trust and Savings

Association, and am employed at its World Headquarters in San Francisco.

2. Recently it has been part of my employment responsibility to calculate the cost to my employer of implementing the Bank Secrecy Act and its Regulations, which are the subject of this action.

3. I have calculated that the first year's cost to my employer of implementing that Act and those Regulations will be $392,631.84. This cost includes equipment, maintenance, salaries, consumable supplies, interest on investments, and insurance. This cost does not include time and effort in responding to demands for information from law enforcement or the Department of the Treasury.

4. The above is true of my own personal knowledge, and if sworn as a witness I could testify competently thereto.

.....

William Ehler

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
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of Northern California, Inc.
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*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

Civil No. C-72-1045-WTS

[Title omitted in printing]

## APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff hereby apply under 28 U.S.C. 2284, for a Temporary Restraining Order, to be issued forthwith, restraining Defendants, their officers, agents, servants, employees, attorneys and those persons in active concern or participation with them who receive actual notice of the Temporary Restraining Order from enforcing, directly or indirectly, any of the provisions of Public Law 91-108 or any of the provisions of 31 CFR Part 103, as that Part is to become

effective on July 1, 1972. The grounds for this Application are set forth in the accompanying Memorandum and Affidavits on file herein and upon all the pleadings and papers on file herein.

Dated: June 29, 1972

Respectfully submitted,

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
*Attorneys for Plaintiffs*

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Attorneys for Plaintiffs

*United States District Court*
*Northern District of California*
Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,
vs.
John B. Connally, Jr., et al.,
Defendants.

City of Walnut Creek
County of Contra Costa—ss

AFFIDAVIT OF THOMAS A. STARK

Thomas A. Stark, being sworn, deposes and says:

1. I am the General Counsel of the Security National Bank, a plaintiff in this action, and have been so employed since 1966. I am familiar with the subject matter of this action and with the Act of Congress and Regulations involved herein.

2. Since the Security National Bank became a plaintiff in this action many of its customers have indicated approval of its action, concern for the privacy of their accounts, and interest in protecting those accounts from surveillance by the government. In my opinion compliance with the Act and Regulations at issue in this action will cause our bank to lose a substantial of customer confidence, customers, and deposits.

3. I am aware that under the Act and Regulations at issue herein our bank may be ordered to comply with said Regulations and various orders issued thereunder. I am also aware that refusal to comply with said regulations and orders will expose our bank and its personnel to the immediate imposition of civil and criminal sanctions.

4. I am in doubt about the meaning and proper interpretation of some of the Regulations and am uncertain as to the duties of our bank in complying with them. This uncertainty is especially acute with respect to our duty to report large cash transactions of some customers but not all, since we are to exclude those transactions made in the "customary conduct of the business" of an "established customer" as described in 31 CFR 103.22.

5. In the recent past our bank advertised in its market area that United States Series E Bonds are not as good an investment as other available investments carrying the full faith and credit of the United States: *i.e.*, time deposits in banks and savings and loan companies. In apparent retribution, the Department of the Treasury cancelled our right to deal in Series E Bonds. To my knowledge our bank is the only insured bank in the United States whose authorization to sell such bonds has been cancelled. We believe as a result of this incident that we are an unpopular bank in the eyes of the Department of the Treasury, and thus more

likely than an ordinary bank to be faced with sanctions under the Act and Regulations at issue herein.

6. The foregoing is true of my own knowledge, and if sworn as a witness I could testify competently thereto.

Executed this 29th day of June, 1972, at Walnut Creek, California.

/s/ THOMAS A. STARK
Thomas A. Stark

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
American Civil Liberties Union Foundation
of Northern California, Inc.
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Attorneys for Plaintiffs

*United States District Court*
*Northern District of California*

Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,
vs.
John B. Connally, Jr., et al.,
Defendants.

State of California
City and County of San Francisco—ss

## AFFIDAVIT OF CHARLES C. MARSON

Charles C. Marson, being sworn, declares and says:

1. I am the Legal Director of the American Civil Liberties Union Foundation of Northern California, Inc.

2. I am a plaintiff in this action and the holder of a demand deposit account in the Bank of America National Trust and Savings Association in San Francisco.

3. I am gravely concerned lest the implementation of Public Law 91-508 and its accompanying Regulations will invade the privacy of my bank account, expose my personal financial affairs to unlawful scrutiny, and expose my political memberships and affiliations to the knowledge of the government.

4. The above facts are within my personal knowledge and if sworn as a witness I could testify competently thereto.

CHARLES C. MARSON

[Seal]

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*United States District Court*
*Northern District of California*

Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,

vs.

John B. Connally, Jr., et al.,
Defendants.

City and County of San Francisco
State of California—ss

## AFFIDAVIT OF JAY A. MILLER

Jay A. Miller, being sworn, declares and says:

1. I am the Executive Director of the plaintiff American Civil Liberties Union of Northern California, Inc. (ACLUNC), and a member of its Board of Directors. From

1965 to June 1971, I was the Executive Director of the Illinois Division of the ACLU.

2. As part of my duties in my position with ACLUNC I seek out, meet with, and speak to many persons who are members of or critics of ACLUNC. I am aware of great reluctance upon the part of a substantial number of members of and contributors to ACLUNC to have their affiliation with ACLUNC learned by employers, government, and the public at large.

3. I am aware that the American Civil Liberties Union and its affiliates have historically been targets for retaliation on the part of some of those who regard the organization and its members as dissident and dangerous.

4. Our surveys indicate that 1% of our members are in the armed forces; 2% in the aerospace industry; 31% in education; and 10% in local, state, or federal government jobs.

5. The above facts are within my personal knowledge and if sworn as a witness I could testify competently thereto.

JAY A. MILLER

[Seal]

James L. Browning, Jr.
United States Attorney

John M. Youngquist
Assistant United States Attorney
Chief, Tax Division
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*Attorneys for Defendants*

*In the United States District Court for the Northern District of California*

Original Filed—Jun 29 1972
Clerk, U. S. Dist. Court
San Francisco

| | |
|---|---|
| Fortney H. Stark, Jr., et al., *Plaintiffs*, v. John B. Connally, Jr., etc., et al., *Defendants.* | NO. C-72-1045-WTS |
| The California Bankers Association, *Plaintiff*, v. John B. Connally, Jr., etc., et al., *Defendants.* | NO. C-72-1157-WTS |

## OPPOSITION TO APPLICATIONS FOR TEMPORARY RESTRAINING ORDERS

The undersigned attorneys hereby specially enter their appearance for the named defendant officers and agencies of the United States of America in each of the above-

entitled actions which have heretofore been filed, docketed and designated in this Court as related civil actions, but which have not been consolidated for hearing. This appearance is made at this time solely to oppose the issuance of any temporary restraining order or orders in these actions, which, it has been informally announced, will be applied for by the various plaintiffs before this Court at 4:00 P.M. on Thursday, June 29, 1972, in Courtroom No. 1, Honorable William T. Sweigert presiding.

This written opposition is being prepared at 1:30 P.M., Thursday, June 29, 1972, for the reason that no application or motion papers in either case were served upon the undersigned attorneys for the defendants until approximately 11:30 A.M. on said date, although the attorneys for the plaintiffs in each action have well known for at least three weeks that the office of the United States Attorney for the Northern District of California would represent the defendants in these actions. As of the time of preparation of this opposition, the undersigned attorneys have still not been served with any application or motion or affidavits re any requested temporary restraining order in No. C-72-1045-WTS; they were served at approximately 10:00 A.M. this date with a 54-page, unindexed "Plaintiffs' Memorandum of Points and Authorities Re: Temporary Restraining Order" in said action. Accordingly, defendants have been, it is submitted, intentionally given no timely opportunity to examine and counter any affidavits presumably to be submitted to the Court to establish some factual record on the statutory question of "irreparable damage." 28 U.S.C. § 2284(3).

In action No. C-72-1157-WTS, the undersigned attorneys were served with motion papers, memorandum and one affidavit in support of a requested temporary restraining

order at 11:30 A.M. on this date, likewise giving defendants no timely opportunity to counter whatever showing as to "irreparable damage" said affidavit purports to establish.

The foregoing is expressed to the Court as relevant to this opposition for the reason that the Court's record shows the following chronology:

(a) The complaint in No. C-72-1045-WTS was filed on *June 7, 1972;* summons was issued thereon and a notice of requirement of three-judge court was filed on the same date; the United States Attorney was served with said process on *June 9, 1972.*

(b) On *June 12, 1972,* the Court issued its "Notice Re Convening of Three Judge Court (28 U.S.C. Sec. 2284)" to the Chief Judge of the United States Court of Appeals for the Ninth Circuit in said action, stating therein that: "A temporary restraining order has not been applied for. No application has yet been made for Preliminary Injunction."

(c) The complaint in No. C-72-1157-WTS was filed on *June 22, 1972;* summons was issued on that date, and said process was served on the United States Attorney on *June 23, 1972.*

(d) No application for temporary restraining order was made at the time of filing of the complaint in said action, and no notice of requirement of a three-judge court has yet been filed in the case to the knowledge of the undersigned attorneys.

The foregoing demonstrates an unconscionable delay on the part of all plaintiffs in coming forward to claim "irreparable damage" and to request temporary restraining orders against the operation of duly-promulgated regulations under an Act of Congress in existence since October

1970 (P.L. 91-508, 84 Stat. 1118), which, as plaintiffs well know and allege, are to go into effect two days from today on July 1, 1972. These applications for restraining orders, it is submitted, are purely tactical, are founded upon no real "irreparable damage" at all, and have been made at the eleventh hour—over three weeks after filing of the complaint in the earliest case—in order to unfairly pressure the defendants and, more importantly, this Court into hasty and unnecessary, summary and temporary action to cloud the operation of valid regulations under a valid Act of Congress for an undetermined period prior to hearing by the three-judge court as required by 28 U.S.C. § 2284(3).

It is submitted that steps taken by plaintiffs here, solely in respect of these applications for temporary restraining orders, are ethically questionable, inequitable, and in specific violation of the letter and spirit of Rule 65(b) of the Federal Rules of Civil Procedure and of LR 117 of this Court. For these reasons alone, the applications should be denied.

Further grounds for denial of the restraining orders sought here are the following:

1. Such affidavits as have been submitted in behalf of plaintiffs are entirely insufficient to show the "irreparable damage" required for a temporary restraining order against the operation of a federal law under 28 U.S.C. § 2284 for the reason that all are based upon speculation as to imagined abuses of constitutional rights of persons, presumably by the Federal Government and its agents, which are by no means or articulation apparent or required on the face of the complained of regulations and statute. Until it is made evident that such abuses as are imagined by plaintiffs actually occur in the operation of the regulations and law no restraint against operation of the law as

intended by Congress should issue. Mere allegations of economic burden in required record-keeping are clearly insufficient to constitute "irreparable damage" under § 2284.

2. Plaintiffs apply for such broad restraints against the Government in these cases as would interfere with the proper use of recognized judicial and administrative process in production of records of financial institutions in pending federal investigations and cases entirely apart and independent of any requirements of the complained-of statute and regulations. Granting such temporary relief in these cases is clearly uncalled for in its disastrous effect of hampering proper Government use of process in criminal and civil proceedings that have been recognized for decades and thoroughly tested and approved by the courts of this Nation.

3. Plaintiffs have posted no security for costs and damages to the Government, required by Rule 65(c) F.R.Civ.P. for the issuance of any temporary restraining orders in these cases.

DATED: June 29, 1972.

Respectfully submitted,

/s/ JAMES L. BROWNING, JR.
James L. Browning, Jr.
United States Attorney

JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

*United States District Court*
*Northern District of California*

Filed Jun 30 1972
C. C. Evensen, Clerk

[Title omitted in printing]

## MEMORANDUM OF DECISION ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs in the two above actions have applied for a temporary restraining order prohibiting defendants, the Secretary of the Treasury, and executive heads of certain other involved federal agencies, from enforcing the provisions of the new so-called Currency and Foreign Transactions and Reporting Act (31 U.S.C. Sec. 1051-1122; 12 U.S.C. Sec. 1829(b)); enacted by the Congress on October 26, 1970 to be effective May 1, 1971, and the Regulations issued thereunder (Title 31, Chap. 1, Part 103, Code of Federal Regulations Secs. 103.11-103.50), which Regulations were promulgated on March 31, 1972 but by their own terms were not to become effective until tomorrow, Saturday, July 1, 1972.

Plaintiffs include several named individual bank customers, the Security National Bank, the California Bankers Association, suing on behalf of all California banks, and the American Civil Liberties Union, suing on behalf of itself and its numerous member bank customers.[1]

Plaintiffs allege that the Act and the Regulations pose a threat of grave and irreparable injury to certain constitutional guarantees: freedom from unreasonable search and seizure; the so-called constitutional right to privacy; the

1. Questions of standing of certain plaintiff organizations to sue have not been considered at this stage of the proceedings.

privilege against self-incrimination; the requirement for due process as it may affect banks and bank customers; and the right of private association under the First Amendment.

Because these cases challenge the constitutionality of an Act of Congress and regulations promulgated thereunder, they are required by 28 U.S.C. Sec. 2284 to be heard and determined by a district court of three judges,[2] but under the provisions of Section 2284 the undersigned District Judge is empowered to grant a temporary restraining order to prevent irreparable injury until hearing and determination by the full court.

The stated purpose of the Act and the regulations promulgated thereunder is to require a certain kind of record-keeping by banks, financial institutions and specified persons and mandatory reporting by them of certain information therefrom, concerning otherwise private customer-bank transactions, to various federal agencies for the avowed reason that such records and reporting will have "a high degree of usefulness in criminal, tax and other regulatory investigations."

Notwithstanding the last minute lateness of plaintiffs' applications and without passing upon the extent, if any to which basic constitutional rights may be impaired by this new law, we are not at this point prepared to say that plaintiffs' claims, which have never been passed upon by any court, are insubstantial; on the other hand, neither the Government, which has, itself, already postponed implementation of this legislation for nearly two years since its enactment, nor the public interest, could possibly be injured

2. This Court has already arranged for assignment by the Chief Judge of the Circuit of two additional judges, Circuit Judge Oliver D. Hamlin and District Judge William G. East (District of Oregon).

by a mere further few weeks delay before requiring said banks, financial institutions and specified persons to comply with the reporting provisions of the Act and Regulations pending an opportunity for more adequate examination of plaintiffs' claims by the required three-judge court and a determination whether a preliminary injunction should be issued.

Any such temporary order in these actions, which for some reason have not been formally brought as representative class actions, would ordinarily be restricted to protection of the rights of the named individual plaintiffs in these two actions and the members of the named plaintiff organizations. However, geographical and mechanical problems presented by a statute of nation-wide applicability are such that fairness and orderliness will be served by imposing a temporary restraint without such limitation.

The Court finds, based upon the evidence submitted to this Court in the form of affidavits filed herein on behalf of plaintiffs, that the specified irreparable damage, as set forth therein, will result if this order is not granted.

For the foregoing reasons, a temporary restraining order is hereby issued accordingly:

It Is Hereby Ordered that defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this Order be, and they hereby are, restrained and enjoined from implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions and persons: specifically, Title 31, U.S.C. §§ 1081, 1082, 1083, 1101, and 1121, insofar as each of said sections requires, or authorizes the requirement of, reports; and 31 C.F.R., Part 103, Subpart B (§§ 103.21 through 103.26, inclusive) and Sub-

part D (§§ 103.41 through 103.50, inclusive), insofar as said Subparts and inclusive sections require, or authorize the requirement of, reports; and

It Is Further Ordered that nothing in this order shall be deemed to restrain or enjoin the implementation or enforcement of the Act and Regulations requiring the maintenance of certain records by banks, other financial institutions and persons: specifically, Title 12 U.S.C. § 1829b; and 31 C.F.R., Part 103, Subpart C (§§ 103.31 through 103.37); and

It Is Further Ordered that nothing in this order shall be deemed to restrain or enjoin the issuance or enforcement of any judicial or administrative process, authorized by existing law, requiring production of records required to be maintained under 12 U.S.C. § 1829b and 31 C.F.R., Part 103, Subpart C (§§ 103.31 through 103.37).

The foregoing order shall be subject to the power of the Court to modify this order, if necessary, for purposes of specificity.

This temporary restraining order shall be returnable upon application for a preliminary injunction on the 20th day of July, 1972 at 10 o'clock A.M., at the Courtroom of Department No. 1 of this Court, before the full three-judge court and upon a schedule for completion of the record by the parties as follows:

By plaintiffs, all evidentiary material relied on, together with briefs, to be served and filed by July 6, 1972; by defendants, all of same to be served and on file by July 13th; by plaintiffs, any properly rebuttal counter-affidavits or briefs to be served and filed by July 18, 1972. Dated: June 30, 1972.

/s/ W. T. Sweigert
W. T. Sweigert
United States District Judge

*United States District Court*
*Northern District of California*

Original
Filed
June 30 1972
Clerk, U. S. Dist. Court
San Francisco

No. 72 1157

The California Bankers Association,
*Plaintiff,*

vs.

JOHN B. CONNALLY, JR., et al.,
*Defendants.*

NOTICE RE CONVENING OF
THREE JUDGE COURT
(28 U.S.C. Sec. 2284)

It appearing to the court that the above-entitled action prays for an interlocutory and/or permanent injunction restraining the enforcement, operation and execution of an Act of Congress towit: Public Law 91-508, 84 Stat. 1114 et seq., and the regulations promulgated thereunder, upon the ground of unconstitutionality of said statute and that said action is one required by an Act of Congress, towit: Title 28 U.S.C. Sec. 2282, to be heard and determined by a district court of three judges;

Now, Therefore, as provided by Title 28 U.S.C. § 2285, the Chief Judge of the Ninth Circuit is hereby notified of such application.

A temporary restraining order has been granted, in part; and the hearing on application for preliminary injunction has been set for July 20, 1972, at 10 o'clock A.M.

Further, this action has been consolidated with *Stark v. Connally,* No. C 72 1045, in which a three judge court has already been appointed, composed of Judge Oliver D. Hamlin, Judge William G. East and the undersigned.

The Clerk of this Court shall forward this notice as required by Title 28 U.S.C. Sec. 2284.

Dated: June 30, 1972.

/s/ W. T. SWEIGERT
W. T. Sweigert
United States District Judge

Philip E. Diamond
John M. Anderson
Edgar B. Washburn

Landels, Ripley & Diamond
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*Attorneys for Plaintiff,*
*The California Bankers Association*

*UNITED STATES DISTRICT COURT*
*FOR THE NORTHERN DISTRICT OF CALIFORNIA*

Original Filed Jul 7 1972

| | |
|---|---|
| Fortney H. Stark, Jr., *et al.*, *Plaintiffs,* v. John B. Connally, Jr., Secretary of the Treasury of the United States, *et al.*, *Defendants.* | No. 72-1045 WTS |
| The California Bankers Association, *Plaintiff,* v. John B. Connally, Jr., Secretary of the Treasury of the United States, *et al.*, *Defendants.* | No. 72-1157 WTS |

## NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

To the parties of record in these cases and to their counsel:

Please take notice that on Monday, July 17, 1972, at 10:00 A.M., or as soon thereafter as the matter can be heard, the plaintiff, The California Bankers Association,

will move the Court for a preliminary injunction enjoining the defendants, their officers, agents, servants, employees, attorneys, and those persons acting in concert or participation with them, pending the final hearing and determination of this action, from implementing or enforcing the so-called Bank Secrecy Act, and specifically: Public Law 91-508, 84 Stat. 114, *et seq.*, on the grounds and for the reasons set forth in the affidavits filed in these consolidated cases on behalf of the plaintiffs, and in the accompanying memorandum of points and authorities.

Dated: July 6, 1972

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond

*Attorneys for Plaintiff,*
*The California Bankers*
*Association*

By s/JOHN M. ANDERSON
John M. Anderson
3300 Crocker Plaza
San Francisco, California 94104

(Certificate of service by mail omitted in printing)

*United States District Court*

*For the Northern District of California*

No. 72-1045 WTS—No. 72-1157 WTS

[Title omitted in printing]

## AFFIDAVIT OF E. L. BROCKETT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of California
County of San Francisco—ss:

E. L. Brockett, being first duly sworn, states:

1. I am Assistant Vice President, California Division, of the Bank of America, N.T. & S.A., and have personal knowledge of the practice of the Bank of America in the making and retention of records.

2. Prior to July 1, 1972, the effective date of the Bank Secrecy Act, the Bank of America was not required to:

(a) Secure and maintain a record of the taxpayer identification number or a record of the Social Security number of its depositors or representative of its depositors, as now required by 31 C.F.R. § 103.34(a);

(b) Retain either the original or a microfilm or other copy of each check, clear draft, or money order drawn on the bank or issued and payable by it, as now required by 31 C.F.R. § 103.34(b)(3); or

(c) Copy both the front and back of those checks cleared by the bank, as now required by 31 C.F.R. § 103.36(a).

At San Francisco, California, this 6th day of July, 1972.

s/ E. L. Brockett
E. L. Brockett

Subscribed and sworn to before
me this 6th day of July, 1972.

s/ Lorraine Peterson

Notary Public

[illegible] County of San Francisco

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
3300 Crocker Plaza
San Francisco, California 94104
Telephone: (415) 362-5808

*Attorneys for Plaintiff,*
*The California Bankers Association*

*United States District Court*
*for the Northern District of California*

No. 72-1045 WTS—No. 72-1157 WTS

[Title omitted in printing]

## AFFIDAVIT OF BREN LUTHI IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of California
County of San Francisco—ss:

Bren Luthi, being first duly sworn, states:

1. I am a TransityAnalyst for the Bank of America, N.T. & S.A., and am personally familiar with the numerical volume of checks cleared by the Bank of America each day.

2. The current daily average volume of checks processed by the Bank of America is approximately 5,538,000.

3. I am also generally familiar with the banking business in the State of California, and represent to the Court that it is generally understood and accepted that the Bank of America, N.T. & S.A., does approximately 40% of the banking business in the State of California.

At San Francisco, California this 6th day of July, 1972.

s/ BREN LUTHI
Bren Luthi

Subscribed and sworn to before
me this 6th day of July, 1972.

/s/ KATHLEEN A. HUNTER
Notary Public
for the County of San Francisco

*UNITED STATES DISTRICT COURT*
*FOR THE NORTHERN DISTRICT OF CALIFORNIA*

Original Filed Jul 7 1972
Clerk, U.S. Dist. Court
San Francisco

(Title omitted in printing)

NOTICE OF MOTION
AND MOTION FOR
ORDER EXTENDING
TEMPORARY RESTRAINING ORDER

To the parties of record in these cases and to their attorneys:

PLEASE TAKE NOTICE that on Monday, July117, 11972, at 10:00 a.m. or as soon thereafter as the matter can be heard, the plaintiff, The California Bankers Association, will move this Court for an order extending the temporary restraining order made by this Court on June 30, 1972, until such time as the Court rules on the plaintiffs' pending motions for a preliminary injunction.

The foregoing motion will be made and based upon the affidavits on file in the plaintiffs' behalf in these consolidated cases; and the memorandum of points and authorities filed in support of plaintiffs' motions for a temporary restraining order and for a preliminary injunction.

Dated: July 6, 1972

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
*Attorneys for Plaintiff,*
*The California Bankers*
*Association*

By s/JOHN M. ANDERSON
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*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
*Plaintiffs,*
vs.
John B. Connally, Jr., et al.,
*Defendants.*

State of California
City and County of San Francisco—ss.

## SUPPLEMENTARY AFFIDAVIT OF JAY A. MILLER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Jay A. Miller, being sworn, declares and says:

1. The membership dues and financial contributions made to the plaintiff American Civil Liberties Union of

Northern California Inc. (hereinafter "ACLUNC") arrive occasionally in the form of money orders, but predominantly in the form of checks, drawn on banks from all over California, whose identities cannot be predicted in advance, occasionally drawn on banks in other states and, on at least one occasion, drawn on a bank in a foreign country.

2. The plaintiff ACLUNC, a California corporation, is affiliated with its parent organization, the American Civil Liberties Union, Inc. (hereinafter "ACLU"), a New York corporation, which maintains its bank account in the Chemical Bank of New York.

3. The current practice of ACLUNC is to coordinate membership drives and fundraising appeals with ACLU. The mechanics of this coordination result in the mailing of membership checks by members of ACLUNC in Northern California either to the San Francisco office of ACLUNC or to ACLU in New York, where the checks received directly from members and contributors are cashed, and appropriate monies remitted to ACLUNC.

4. The above is within my own knowledge and if sworn as a witness I could testify competently thereto.

JAY A. MILLER

Subscribed and sworn to before me this 6th day of July, 1972.

PAMELA S. FORD—Notary Public

[Seal]

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
American Civil Liberties Union Foundation
of Northern California, Inc.
593 Market Street, Suite 227
San Francisco, California 94105
Telephone: 433-2750

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Telephone: 452-2133

*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

Civil No. C-72-1045-WTS

[Title omitted in printing]

State of California
County of Contra Costa—ss.

## AFFIDAVIT OF ALFRED P. DAVIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Alfred P. Davies, being sworn, deposes and says:

1. I am the Senior Vice President of the plaintiff Security National Bank (hereinafter "the Bank"), and am concerned with implementing the recordkeeping requirements

of Public Law 91-508 and its Regulations (hereinafter "the Act and Regulations").

2. Before the effective date of the Act and Regulations, it was, and but for the Act and Regulations it would still be, the business policy and practice of the Bank:

a) to open a checking account without demanding from the customer a Social Security or Taxpayer Identification number;

b) to maintain records of loans not involving installment payments (such as commercial ninety-day notes) but involving the extension of credit for more than five thousand dollars, unsecured by real property, only for a short time after the transactions were closed. Such records were not retained substantially longer than one year.

c) to maintain no records of advice, request or instruction concerning the transfer of funds or currency outside the United States involving more than $10,000, as now required to be kept by 31 C.F.R. § 103.33(e).

3. The foregoing is true of my own knowledge, and if sworn as a witness I could testify competently thereto.

/s/ Alfred P. Davies
Alfred P. Davies

CORPORATE ACKNOWLEDGMENT

[Seal]
State of California
County of Contra Costa—ss.

On this 6th day of July, 1972, before me, Gina Capers, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Alfred P. Davies, known to me to be the Senior Vice President, of the corporation that executed the within instrument, and known to me to be the persons who executed the

within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal.

/s/ GINA CAPERS
Notary Public in and for said
County and State.

James L. Browning, Jr.
United States Attorney
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division
16th Floor Federal Building
450 Golden Gate Avenue—Box 35055
San Francisco, California 94102
Telephone: 556-3213

John J. McCarthy
*Attorneys for Defendants*

*In the United States District Court for the Northern District of California*

Original—Filed Jul 13 1972
Clerk, U. S. Dist. Court San Francisco

| | |
|---|---|
| Fortney H. Stark, Jr., et al., *Plaintiffs* v. John B. Connally, Jr., etc., et al., *Defendants* | No. C-72-1045-WTS |
| The California Bankers Association, *Plaintiff* v. John B. Connally, Jr., etc., et al., *Defendants* | No. C-72-1157-WTS |

## MOTION TO DISMISS

Now come the defendants, by their attorneys, and do move the Court to dismiss the above-entitled actions on the following grounds:

1. The plaintiffs have not stated claims upon which relief can be granted;

2. The plaintiffs have no standing to maintain the instant lawsuits; and

3. These suits are in substance unconsented suits against the sovereign and, therefore, under the principle of sovereign immunity the Court has no jurisdiction over the United States and its agents in these proceedings.

Jul 13 1972

/s/ JAMES L. BROWNING, JR.
James L. Browning, Jr.
United States Attorney

/s/ JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

/s/ JOHN J. MCCARTHY
John J. McCarthy
Chief, General Litigation Section
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John J. McCarthy
*Attorneys for Defendants*

*United States District Court*
*Northern District of California*

NO. C-72-1045—WTS
NO. C-72-1157—WTS

[Title omitted in printing]

## OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTIONS

Now come the defendants, by their attorneys, and do oppose the plaintiffs' motions for preliminary injunctions in these two proceedings on the following grounds:

1. The plaintiffs have not stated a claim upon which relief can be granted in that they have not and cannot demonstrate any legally recognized right which the statute under attack and the regulations promulgated thereunder would violate or infringe. Insofar as the non-banking plaintiffs are concerned, under presently existing laws, apart and separate from the statute under attack, the Federal Government can inspect any bank records which pertain to said non-banking plaintiffs; and no recognized privilege nor the Fourth nor Fifth Amendments to the Constitution prohibit any such reasonable inspection of records by the Government. *Donaldson v. United States,* 400 U.S. 517, 522 (1971); *Harris v. United States,* 413 F. 2d 316 (C.A. 9, 1969); *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969); *Galbraith v. United States,* 387 F. 2d 617 (C.A. 10, 1968); *United States v. Gross,* 416 F. 2d 1205 (C.A. 8, 1969), certiorari denied 397 U.S. 1013 (1970); *DeMasters v. Arend,* 313 F. 2d 79 (C.A. 9, 1963); *Application of Cole,* 342 F. 2d 5 (C.A. 2, 1965), certiorari denied 381 U.S. 950 (1965). With respect to the banking plaintiffs, it is clear that under existing law the Federal Government acting in an area properly subject to federal legislative

jurisdiction can require a person or bank to keep records, as does the statute under attack. *Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. Falsone*, 205 F. 2d 734, 739 (C.A. 5, 1953); *see: United States v. Bouschor*, 200 F. Supp. 541, 542 (Minn., 1961), affirmed 316 F. 2d 451 (C.A. 8, 1963); 26 U.S.C., Section 6001.

2. The plaintiffs have no standing as a matter of law to maintain the instant lawsuits and thus have no standing to obtain preliminary injunctions in that they cannot specify any legally recognized right which would be violated if the statute and regulations in question were enforced, and hence they can point to no legal injury flowing from the enforcement of said statute and regulations.

3. No preliminary injunction should be entered as the plaintiffs cannot demonstrate any reasonable probability of success in maintaining the instant lawsuits.

4. The plaintiffs are not entitled to the entry of preliminary injunctions as they cannot demonstrate that they will suffer any irreparable harm if preliminary injunctions are not granted. In an affidavit executed by William Ehler and filed by counsel for the plaintiffs it is contended that the plaintiffs will expend large sums in keeping the records required by the statute and regulations under attack. However, a recognized representative of the banking industry has testified to the contrary in Congressional hearings on the statute under attack. Carl W. Desch, Senior Vice President, First National City Bank of New York, on behalf of the New York Clearing House Association, in *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st & 2d Sess. 316, 327 (1969 & 1970), stated:

> "I should like to emphasize if I may, sir, that the cost is not really the thing that is bothering us at all.

"It is the privacy aspect of what the bill might enable people to do, and what you do with the item, with those tremendous masses of paper and their value in relation to accessibility."

In addition Congressman Patman in House Report No. 91-975 91st Cong., 2d Sess. 1970 in reporting on H.R. 15073 published in 1971-1 Cum. Bull. 559, 560 stated:

"The photocopying requirements of the bill will not significantly increase the cost to the affected financial institutions. Most banks and other financial institutions already maintain the types of records contemplated by the bill. In addition, the cost of microfilming checks and similar drafts is minimal. It has been estimated that the average cost including labor and equipment for microfilming checks for banks ranges from less than 1½ mils for small-scale operations down to ½ mil or less for large-scale operations. By comparison with a 10 cent per check service charge, the photocopying cost is negligible.

"The identification of depositors and those authorized to deal with respect to accounts presents a related law enforcement problem. Most domestic financial institutions clearly identify their customers and such identification is readily available."

5. Preliminary injunctions should not be entered in the instant cases because said injunctions would not maintain the status quo, but would irrevocably impair the Government's right to financial information as provided for in the statute and regulations under attack. Absent the statute under attack and the regulations promulgated thereunder, banks throughout the country are free to keep incomplete

or no records and are free to destroy existing bank records after retaining them but for a short period of time. This, of course, results in information being lost to the Government forever. The statute under attack and the regulations promulgated thereunder seek to remedy this loss. Granting of the requested injunctions would not maintain the status quo but would continue this loss of information.

6. Injunctions should not be granted in the instant suits in that these suits are in substance unconsented suits against the sovereign and therefore violative to the principle of sovereign immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

Jul 13 1972

/s/ JAMES L. BROWNING, JR.
James L. Browning, Jr.
United States Attorney

/s/ JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

/s/ JOHN J. MCCARTHY
John J. McCarthy
Chief, General Litigation Section
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*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

| | |
|---|---|
| Fortney H. Stark, Jr., Security National Bank, Charles C. Marson, American Civil Liberties Union of Northern California, Inc., Fred Lieberman, Edward C. Harwood, Carl Bruer, Edward Durell, and Does Five through Twenty, inclusive,<br>*Plaintiffs,*<br>vs.<br>John B. Connally, Jr., Secretary of the Treasury, George P. Shultz, Secretary-Designate of the Treasury, William B. Camp, Comptroller of the Currency, Myles J. Ambrose, Commissioner of Customs, Johnnie M. Walters, Commissioner of the Internal Revenue Service, Herman Nickerson, Jr., Administrator of the National Credit Union, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and Does Twenty-One through Forty, inclusive,<br>*Defendants.* | No. C-72-1045-WTS |

## FIRST AMENDED COMPLAINT

Plaintiffs allege:

I.

This is an action for injunctive, mandamus, and declaratory relief to prevent the enforcement of an Act of Congress, and Regulations promulgated thereunder, which require the reporting of certain financial transactions and the making and retention of copies of checks and records by banks, other financial institutions, and individuals. This Court has jurisdiction under Title 5, U.S.C., Sections 701-06, and Title 28, U.S.C., Sections 1331, 1332, 1346, 1348, 1349, 1361, 2201, and 2282, as hereinafter more fully alleged.

II.

In 1970 the Congress of the United States enacted and the President of the United States signed into law Public Law 91-508, 84 Stat. 1114 et seq., referred to hereinafter as "the Act."

III.

In April, 1971, purportedly pursuant to the authority granted to him by the Act, the Secretary of the Treasury promulgated certain regulations adding Part 103 to the Code of Federal Regulations, referred to hereinafter as "the Regulations." Said Regulations will become effective July 1, 1972.

IV.

Plaintiff Fortney H. Stark, Jr., is the President of the Security National Bank and a customer of and depositor therein, and a resident of the judicial district of the United States District Court for the Northern District of California.

V.

Plaintiff Security National Bank is a duly chartered, insured and operating national bank, with its principal office in Walnut Creek, California.

VI.

Plaintiff Charles C. Marson is a resident of Berkeley, California, a customer of and depositor in the Bank of America, a duly chartered, insured and operating national bank with its principal office in San Francisco, California.

VII.

Plaintiff American Civil Liberties Union of Northern California, Inc., is a non-profit membership corporation organized under the laws of the State of California, with its principal office in San Francisco, California, which is dedicated solely to the preservation and advancement of the guarantees of individual liberties found in the United States Constitution and the Bill of Rights through litigation, legislation and education. Plaintiff American Civil Liberties Union of Northern California, Inc. is regarded by many as a controversial organization. Plaintiff American Civil Liberties Union of Northern California, Inc. desires, and its members desire, to maintain the identities of its members and contributors in strict confidence.

VII-A.

Plaintiff Fred Lieberman is a resident of Elkins Park, Pennsylvania. Plaintiff Edward C. Harwood is a resident of Barrington, Massachusetts. Plaintiff Carl Bruer is a resident of Princeton, New Jersey. Plaintiff Edward Durell is a resident of Columbus, Ohio.

VII-B.

Plaintiff Lieberman has repeatedly in the recent past transported, mailed or shipped, or caused to transported, mailed or shipped, one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States, and expects to have reason to

do so again in the near future. Plaintiff Liberman objects to those portions of the Act and Regulations that require him to report such transactions because he regards such requirements as unconstitutional, for the reasons more fully alleged hereinafter.

VII-C.

Plaintiffs Liberman, Harwood, Bruer and Durell each maintain a financial interest in and signature authority over one or more bank accounts in foreign countries. Each of said plaintiffs objects to those portions of the Act and Regulations that require him to report such interest and authority to the Government because he regards the such requirements as unconstitutional, for the reasons more fully alleged hereinafter.

VIII.

Plaintiffs do not now know the names or capacities of plaintiffs Doe Five through Doe Twenty, inclusive, and will amend this Complaint as soon as the names and capacities of said Plaintiffs are ascertained.

IX.

Defendant John B. Connally, Jr. is the Secretary of the Treasury of the United States (hereinafter referred to as "the Secretary"). Defendant Charles Shultz has been appointed as Secretary of the Treasury, subject to confirmation by the United States Senate. Defendants Connally and Shultz are charged with the duty and responsibility of enforcing the Act and Regulations.

X.

Defendant William B. Camp is Comptroller of the Currency; defendant Myles J. Ambrose is Commissioner of Customs; defendant Johnnie M. Walters is Commissioner of the Internal Revenue Service; defendant Herman Nick-

erson, Jr. is Administrator of the National Credit Union. Defendants Camp, Ambrose, Walters, Nickerson, and the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission are charged under the Act and Regulations with the duty and responsibility of enforcing the Act and Regulations.

XI.

Plaintiffs do not now know the names or capacities of Defendants Doe Twenty-One through Doe Forth, inclusive, and will amend this Complaint as soon as the names and capacities of said Defendants are ascertained.

XII.

The Act and Regulations require that Plaintiff Security National Bank affirmatively and promptly report to the Secretary, in addition to other transactions, the following:

a. the transportation by it of a monetary instrument having a value of more than $5,000.00 into or out of the United States;

b. each deposit, withdrawal, exchange of currency or other payment by, through, or to Security National Bank which involves a transaction in currency of mofe than $10,000.00; except that plaintiff Security National Bank is not required to report transactions with an established customer which it reasonably concludes does not exceed in its currency transactions amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.

XIII.

The Act and Regulations further require that plaintiff Security National Bank retain either the original or a

microfilm or other copy or reproduction of each of the following:

a. the front and back of all checks and money orders drawn on it; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criteria are exempt;

b. records of each transaction involving a checking or savings account;

c. records of each extension of credit of more than $5,000.00 not secured by real property;

d. records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

XIV.

The reporting and recordkeeping requirements under the Act and Regulations may be modified or expanded at the will of the Secretary under C.F.R. 103.45(a), which provides, in part, as follows:

> The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions.

XV.

If the Act and Regulations are permitted to become effective, plaintiff Security National Bank will be forced

to violate good banking practice and its customers' right of privacy and confidentiality in their financial and personal affairs and as a direct and proximate result thereof will lose significant numbers of its customers and substantial deposits. The monetary damage to plaintiff Security National Bank as a direct and proximate result of the implementation of the Act and Regulations will be in excess of $10,000.00.

XVI.

Plaintiff American Civil Liberties Union of Northern California, Inc. maintains accounts in the Wells Fargo Bank and Trust Company at its Market-Montgomery Street branch in the City and County of San Francisco.

The Act and Regulations provide that the Secretary may make any information set forth in any reports received by him pursuant to the Regulations available to any other department or agency of the United States upon the written request of the head of such department or agency.

The Federal Bureau of Investigation is such an agency of the United States.

Neither the Act nor the Regulations provide that information received from the Secretary by a department or agency of the United States must be maintained confidentially.

As heretofore alleged by plaintiff Security National Bank, the Regulations may be modified or expanded at the will of the Secretary and said modifications or expansions may be made to apply to particular persons or to particular classes of persons.

If the Act and Regulations are permitted to become effective, plaintiff American Civil Liberties Union of Northern California, Inc. will no longer be able to reasonably and effectively maintain the anonymity of its members and contributors and as a direct and proximate result thereof

will lose significant numbers of its members and substantial contributions. The monetary damage to plaintiff American Civil Liberties Union of Northern California, Inc. as a direct and proximate result of the implementation of the Act and Regulations will be in excess of $10,000.00.

## XVII.

Plaintiff Stark is a depositor in plaintiff Security National Bank and, as heretofore alleged, plaintiff Marson is a depositor in the Bank of America.

If the Act and Regulations are permitted to become effective, plaintiffs Stark and Marson's contributions and dues to organizations and associations may be easily and simply determined by the Secretary or his designate from information required to be maintained and reported pursuant to the Regulations and as a direct and proximate result thereof plaintiffs Stark and Marson will suffer a chilling effect upon their right of association as guaranteed by the First Amendment to the United States Constitution and an abridgment of their constitutional right of privacy.

If the Act and Regulations are permitted to become effective:

a. the information required to reconstruct plaintiffs Stark and Marson's demand deposit accounts and to trace any check deposited in such accounts through the banks' domestic processing systems must be maintained and is subject to seizure, without notice to plaintiffs Stark or Marson, by written order of the Secretary;

b. plaintiffs Stark and Marson's banks must maintain the original or reproduce each statement, ledger card or other record concerning their respective deposit accounts, showing each transaction in, or with respect to, that account and such records are subject

to seizure, without notice to plaintiffs Stark or Marson, by written order of the Secretary; and

c. plaintiffs Stark and Marson's banks must maintain the original or reprodnce each check or money order drawn from their respective deposit accounts and submit the same to the Secretary, without notice to plaintiffs Stark or Marson, upon written order of the Secretary.

As a direct and proximate result thereof, plaintiffs Stark and Marson's right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution will be violated.

XVII-A.

If the Act and Regulations are permitted to become effective, plaintiff Lieberman will be forced to report to the Government the details of each transaction in which he transfers a monetary instrument of a value in excess of $5,000 from a place inside the United States to a place outside the United States. As a direct and proximate result thereof plaintiff Lieberman's right to be free of unreasonable seizures and his right to privacy will be violated.

XVII-B.

If the Act and Regulations are permitted to become effective, plaintiffs Lieberman, Harwood, Bruer and Durell will each be forced to report to the Government his financial interest in and signature authority over his bank account or accounts in foreign countries. As a direct and proximate result thereof said plaintiffs' rights to be free of unreasonable seizures and rights of privacy will be violated.

XVIII.

Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of law. If this Court does not enjoin

defendants as hereinafter prayed, plaintiffs will immediately and irreparably suffer injury as hereinbefore alleged.

XIX.

An actual controversy exists between plaintiffs and defendants. Plaintiffs believe and allege that the Act and Regulations are unconstitutional, null and void in their entirety because they violate the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. Plaintiffs are informed and believe and, based upon such information and belief, allege that defendants contend that the Act and Regulations are legal and constitutional in all respects.

Wherefore plaintiffs pray that this Court:

1. Issue preliminary and permanent injunctions and its writ of mandate enjoining and preventing defendants and their agents, servants, employees, representatives and successors from enforcing any of the provisions of the Act and Regulations in dispute herein;

2. Issue a declaratory judgment declaring the Act and Regulations in dispute herein unconstitutional, null and void in their entirety as being repugnant to the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution;

3. Grant plaintiffs the costs of suit herein; and

4. Grant such other and further relief as is just.

Dated: July 14, 1972

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
*Attorneys for Plaintiffs*

State of California
City and County of San Francisco—ss.

VERIFICATION

Charles C. Marson, being sworn, declares and says:

I am one of the plaintiffs herein; I have read the foregoing First Amended Complaint. The matters stated therein are true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe them to be true.

Dated at San Francisco, California, this 14th day of July, 1972.

CHARLES C. MARSON

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Charles C. Marson
Peter Sheehan
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*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

Civil No. C-72-1045-WTS
[Title omitted in printing]

## NOTICE OF MOTION AND MOTION FOR LEAVE TO AMEND COMPLAINT BY ADDING PLAINTIFFS

To the Above-Named Defendants and to Their Attorneys: Please Take Notice that on Monday, July 17, 1972, at 10:00 A.M., in the Courtroom of the Honorable William T. Sweigert, United States District Judge, at 450 Golden Gate Avenue, San Francisco, Plaintiffs will move for leave to amend their Complaint in the manner set forth in the First Amended Complaint, attached hereto and incorporated by reference herein. Said Motion will be based upon the accom-

panying Memorandum of Points and Authorities and upon all the pleadings and papers on file herein.

Dated: July 14, 1972

Respectfully submitted,

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
*Attorneys for Plaintiffs*

## MOTION FOR LEAVE TO AMEND COMPLAINT BY ADDING PLAINTIFFS

Plaintiffs hereby move for leave to amend their Complaint by adding plaintiffs in the manner set forth in the First Amended Complaint, attached hereto and incorporated by reference herein.

Dated: July 14, 1972

Respectfully submitted,

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
*Attorneys for Plaintiffs*

*United States District Court*
*Northern District of California*

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|---|---|
| Fortney H. Stark, Jr., et al., *Plaintiffs,* vs. John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.* | NO. 72 1045 |
| The California Bankers Association, *Plaintiff,* vs. John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.* | NO. 72 1157 |

## MEMORANDUM OF DECISION

Before: Hamlin,* Circuit Judge, EAST and SWEIGERT, District Judges

SWEIGERT, J.

Plaintiffs in No. 72 1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72 1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank

*Judge Hamlin dissents in part.

Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051-1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. subpart C, Secs. 103.31-103.37. Section 1829b(b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31-103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional viola-

tion in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 101 and 121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21-103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

*Reporting of Foreign Financial Transactions*

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub. b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101, excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United

States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122).

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, there is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) at 526. The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveilance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign powers are involved. See, *United States v. United States District Court,* ..... U.S. ..... (6/19/72) (slip opinion pp. 10-12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

*Reporting of Domestic Financial Transactions*

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by person participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Transaction-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary instruments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm al checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction, the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further, such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment.[1]

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1. It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

That there is such a thing as a constitutionally protected "right of privacy" has been recognized by the Supreme Court in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) and most recently in *United States v. United States District Court* ..... U.S. ..... (June 19, 1972).[1a]

In *Katz v. United States*, supra, the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274 U.S. 559, 563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See, *Rios v. United States*, 364 U.S. 253 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) . . . No less than an individual in a business office, in a friends apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

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1a. See also, *Doe v. McMillan*, 442 F.2d 879 (D.C.Cir. 1971); *York v. Story*, 324 F.2d 250 (9th Cir. 1963); *Zimmerman v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936). But see, 25 F.Supp. (1938), aff'd in 105 F.2d 583, 586 (1939); *Dietmann v. Time*, 284 F.Supp. 925 (C.D.Cal. 1966); *City of Carmel v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex v. Smith*, 146 Atl. 34 (New Jersey 1969).

Harlan, J. concurring at p. 360-361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States v. United States District Court,* ..... U.S. ..... (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel v. Young, supra* the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold v. Connecticut, supra,* held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrustion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case

where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a fifth Amendment self-incrimination. *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States*, 387 F.2d 617 (10th Cir. 1968); *Application of Cole*, 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend*, 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the customer's account, and (2) the government agency was fol-

lowing established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detail information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz*, supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel v. Young*, supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" . . . "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold v. Connecticut, supra,* 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker, supra,* 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from

the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summon the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the bank or by the customer-taxpayer himself as an intervening third party interest whose financial transactions are involved. *Reisman v. Coplin*, 375 U.S. 440 (1964).[2]

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2. It is true that in *Donaldson v. United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States v. Kordell*, 397 U.S. 1, 7; and *Reisman v. Coplin*, 385 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States v. Morton Salt*, 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro v. United States*, 335 U.S. 1 (1948) at 32-33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds

have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann v. Securities & Exchange Commission*, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States v. United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel v. Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury, testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U. S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, *whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be

contested in court in the same manner as it heretofore has been contested." (emphasis added).

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.

Dated: August 4th, 1972

O. D. HAMLIN
*Circuit Judge*

/s/ WILLIAM G. EAST
William G. East
*District Judge*

/s/ W. T. SWEIGERT
W. T. Sweigert
*District Judge*

STARK, et al. v. CONNALLY, et al.—No. 72-1045
CALIFORNIA BANKERS ASSOCIATION v. CONNALLY, et al.—No. 72-1157

Hamlin, Circuit Judge, dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

/s/ O. D. HAMLIN

*United States District Court*
*Northern District of California*

Filed—Oct 18 1972

Charles J. Ulfers, Clerk

[Title omitted in printing]

## ORDER GRANTING IN PART PRELIMINARY INJUNCTION

These actions having regularly come on for hearing pursuant to 28 U.S.C. §§ 2282 and 2284, F.R.Civ.P. 65, and LR 17, 114 and 117, Honorable William T. Sweigert, District Judge, Honorable William G. East, Senior District Judge, Honorable Oliver D. Hamlin, Senior Circuit Judge, presiding upon the plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss, and a memorandum of decision setting forth and specifying findings of fact and conclusions of law in accordance with F.R.Civ.P. 52 and 65(d) having been duly rendered and filed herein on September 11, 1972:

Now, therefore, in accordance with said memorandum of decision, it is hereby

(1) Ordered that the temporary restraining order heretofore entered in this action on June 30, 1972, be and it hereby is dissolved; and it is further

(2) Ordered that, it having been decided by the Court that certain provisions of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970), are repugnant to Amendment IV of the Constitution of the United States—to wit: Sections 221, 222, and 223 of Chapter 2 of Title II (Short title: "Currency and Foreign Transactions Reporting Act") of said Public Law 91-508, 84 Stat. at 1122 (now contained in Sections 1081, 1082, and 1083 of Title 31, United States

Code), plaintiff's motion to enjoin the enforcement, operation and execution of said specified provisions of said law is granted pending final adjudication of this action, and that defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, be and they hereby are enjoined from enforcing and from implementing by regulations under Part 103, Subparts B and D of Title 31, Code of Federal Regulations, or otherwise, the provisions contained in Sections 1081, 1082, and 1083 of Title 31, United States Code, until further order of this Court or until the adjudication of this action otherwise becomes final; and it is further

(3) Ordered that, it having been decided by the Court that the provisions of said Public Law 91-508, other than those specifically referred to and enjoined in clause (2) above are not repugnant to any provision of the Constitution of the United States, plaintiff's motion to enjoin the enforcement, operation and execution of all other provisions of said law—to wit: those provisions of Titles I and II of said Public Law 91-508, 84 Stat. 1114-1124, now contained in Sections 1730d, 1829b, and 1951 through 1959 of Title 12, United States Code, and in Sections 1051 through 1062, and 1101 through 1122 of Title 31, United States Code, is denied in all respects; and it is further

(4) Ordered that defendants' motion to dismiss the complaint for failure to state claims upon which relief can be granted is denied without prejudice.

Ordered in accordance with 28 U.S.C. § 2284(5) this 18th day of October, 1972, at San Francisco, California.

/s/ William G. East
William G. East
*Senior District Judge*

/s/ William T. Sweigert
William T. Sweigert
*District Judge*

James L. Browning, Jr.
United States Attorney

John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

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*Attorneys for Defendants*

*In the United States District Court for the Northern District of California*

Original Filed
Nov. 16, 1972
Clerk, U. S. Dist. Court
San Francisco

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|---|---|
| The California Bankers Association,<br>*Plaintiff,*<br>v.<br>John B. Connally, Jr., Secretary of the Treasury of the United States; George P. Shultz, Secretary-Designate of the Treasury; William B. Camp, Comptroller of the Currency; Myles J. Ambrose, Commissioner of Customs; Johnnie M. Walters, Commissioner of the Internal Revenue Service; Herman Nickerson, Jr., Administrator of the National Credit Union; The Board of Governors of the Federal Reserve System; the Federal Home Loan Bank Board; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission,<br>*Defendants.* | No. C-72-1157-WTS |

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM ORDER GRANTING IN PART PRELIMINARY INJUNCTION

Notice is hereby given that all defendants above named hereby appeal to the Supreme Court of the United States from that portion of the Order Granting In Part Preliminary Injunction filed in this action on October 18, 1972, which holds under clause (2) thereof, and Act of Congress (to wit: Public Law 91-508, 84 Stat. 1114) to be unconstitutional in part, said order being an interlocutory order granting an interlocutory injunction restraining the enforcement of said Act in part.

This appeal is taken and this notice is filed pursuant to 28 U.S.C. §§ 1252, 1253, 2101(a), and 2282, and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take further notice that a previous notice of appeal in this action was filed by defendants on October 6, 1972, from that portion of the decision of the three-judge Court filed herein on September 11, 1972, which could be construed as an appealable interlocutory order. The order of October 18, 1972, granting in part preliminary injunction, may now be construed as the appealable order issuing from said decision and may accordingly moot the notice of appeal filed October 6, 1972. Therefore, the instant notice of appeal is filed by defendants.

DATED: November 13, 1972.

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division
*Attorneys for Defendants*

[Certificate of Service by Mail omitted in printing]

*In the United States District Court for the Northern District of California*

(No. C-72-1045-WTS)

**Fortney H. Stark, Jr., Security National Bank, Charles C. Marson, American Civil Liberties Union of Northern California, Inc., Fred Lieberman, Edward C. Harwood, Carl Bruer, Edward Durell, and Does Five Through Twenty, Inclusive, Plaintiffs**

*v.*

**John B. Connally, Jr., Secretary of the Treasury, George P. Shultz, Secretary-Designate of the Treasury, William B. Camp, Comptroller of the Currency, Myles J. Ambrose, Commissioner of Customs, Johnnie M. Walters, Commissioner of the Internal Revenue Service, Herman Nickerson, Jr., Administrator of the National Credit Union, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and Does Twenty-One Through Forty, Inclusive. Defendants**

**James L. Browning, Jr.,**
*United States Attorney.*

**John M. Youngquist,**
*Assistant United States Attorney,*
*Chief, Tax Division.*
*San Francisco, California 94102,*
*Attorneys for Defendants.*

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM ORDER GRANTING IN PART PRELIMINARY INJUNCTION

NOTICE IS HEREBY GIVEN that all defendants above named hereby appeal to the Supreme Court of the United States from that portion of the Order Granting In Part Preliminary Injunction filed in this action on October 18, 1972,

which holds under clause (2) thereof, an Act of Congress (to wit: Public Law 91-508, 84 Stat. 1114) to be unconstitutional in part, said order being an interlocutory order granting an interlocutory injunction restraining the enforcement of said Act in part.

This appeal is taken and this notice is filed pursuant to 28 U.S.C. §§ 1252, 1253, 2101(a), and 2282, and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take Further Notice that a previous notice of appeal in this action was filed by defendants on October 6, 1972, from that portion of the decision of the three-judge Court filed herein on September 11, 1972, which could be construed as an appealable interlocutory order. The order of October 18, 1972, granting in part preliminary junction, may now be construed as the appealable order issuing from said decision and may accordingly moot the notice of appeal filed October 6, 1972. Therefore, the instant notice of appeal is filed by defendants.

JAMES L. BROWNING, JR.,
*United States Attorney.*

By JOHN M. YOUNGQUIST,
*Assistant United States Attorney,*
*Chief, Tax Division,*
*Attorneys for Defendants.*

Dated: November 13, 1972.

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*Attorney for*
*The California Bankers Association*

*United States District Court for the*
*Northern District of California*

No. C 72-1157 WTS

[Title omitted in printing]

## NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Please take notice that the plaintiff, The California Bankers Association, cross-appeals to the Supreme Court of the United States from that portion of the order filed in this case on October 18, 1972, denying, in part, plaintiff's motion for a preliminary injunction against an Act of Congress, and specifically, from that portion of the order included in the third numbered paragraph denying plaintiff's motion for an order enjoining enforcement, operation, and execution of those provisions of Titles I and II of Public Law 91-508, 84 Stat. 1114-1124, now contained in Sections 1730(d), 1829(b), and 1951-1959 of Title XII, United States Code, and Sections 1051-1062 and 1101-1122 of Title XXXI, United States Code.

This cross-appeal is taken and this notice is filed and served pursuant to 28 U.S.C. §§ 1253 and 2101(a), and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take further notice that a previous notice of cross-appeal in this case was filed by the plaintiff on October 10, 1972. The foregoing notice of cross-appeal was taken from

that portion of a memorandum decision filed in this case on September 11, 1972, and which might have been construed as an appealable interlocutory order. The order of October 18, 1972, described above, granting in part and denying in part plaintiff's motion for a preliminary injunction, may now be construed as the appealable order issuing from said decision, and may accordingly make the notice of cross-appeal filed in this case on October 10, 1972, moot. For that reason, the plaintiff files the foregoing notice of cross-appeal.

Dated: November 16, 1972

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*Attorney for*
*The California Bankers Association*

By /s JOHN M. ANDERSON
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[Proof of Service omitted in printing]

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*United States District Court*
*Northern District of California*

No. C-72-1045-WTS

[Title omitted in printing]

## NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Please Take Notice that Fortney H. Stark, Jr., Security National Bank, Charles C. Marson, American Civil Liberties Union of Northern California, Inc., Fred Lieberman, Edward C. Harwood, Carl Bruer, Edward Durell, and Does Five through Twenty, inclusive, all of the plaintiffs in the above-named action, cross-appeal to the Supreme Court of the United States from that portion of the order filed in this case on October 18, 1972, denying, in part, plaintiffs' motion for a preliminary injunction against an Act of Congress, and specifically, from the portion of the order included in the third numbered paragraph denying plaintiffs' motion for an order enjoining enforcement, operation, and execution of those provisions of Titles I and

II of Public Law 91-508, 84 Sta. 1114-1124, now contained in Sections 1730(d), 1829(b), and 1951-1959 of Title XII, United States Code, and Sections 1051-1062 and 1101-1122 of Title XXXI, United States Code.

This cross-appeal is taken and this notice is filed and served pursuant to 28 U.S.C. §§ 1253 and 2101(a), and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please Take Further Notice that a previous notice of cross-appeal in this case was filed by the plaintiffs on October 11, 1972. The foregoing notice of cross-appeal was taken from that portion of a memorandum decision filed in this case on September 11, 1972, and which might have been construed as an appealable interlocutory order. The order of October 18, 1972, described above, granting in part and denying in part plaintiffs' motion for a preliminary injunction, may not be construed as the appealable order issuing from said decision, and may accordingly make the notice of cross-appeal filed in this case on October 10, 1972, moot. For that reason, the plaintiffs file the foregoing notice of cross-appeal.

DATED: November 17, 1972

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By PETER SHEEHAN
*Attorneys for Plaintiffs*

*Supreme Court of the United States*

No. 72-985, 72-1073, 72-1196

The California Bankers Association,
Appellant,

v.

George P. Shultz, Secretary of the Treasury, et al.;

George P. Shultz, Secretary of the Treasury, et al.,
Appellants,

v.

The California Bankers Association, et al.; and
Fortney H. Stark, Jr., et al.,
Appellants,

George P. Shultz, et al.

Appeals from the United States District Court for the Northern District of California.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and two hours are allotted for oral argument.

October 9, 1973